J Raju a/l M Kerpaya v Commerce International Merchant Bankers Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-03-1 OF 2000

GOPAL SRI RAM, HAIDAR JJCA AND AZMEL J

14 APRIL 2000

Bankruptcy *— Notice — Amount claimed not in judgment — Penalty interest and stamp duty claimed in notice were not awarded in judgment — Whether notice null and void ab initio — Whether merely a case of mistake in notice — Bankruptcy Act 1967 ss 3(1)(i) & (2)(ii)*

The issue in this appeal concerned the validity of a bankruptcy notice issued at the instance of the respondent. The bankruptcy notice stated, inter alia, that there was a sum of RM3,013,221.07 due from the appellant as at 31 October 1989. It then set out particulars of the respondent's claim to this sum which included the principal sum due on the judgment obtained against the appellant and several sums of penalty interest calculated at varying rates. There was also a claim of RM80 as stamp duty. The judgment obtained by the respondent, however, made no mention whatsoever of penalty interest or of stamp duty. The appellant took out a summons to set aside the bankruptcy notice under r 18 of the Bankruptcy Rules 1969 ('the Rules'). It was submitted that the bankruptcy notice was not in accordance with the judgment and was therefore null and void ab initio. The respondent submitted that this was merely an instance where a larger sum had been specified in the notice. It was argued that the appellant's case came within proviso (ii) to s 3(2) of the Bankruptcy Act 1967 ('the Act'). It was therefore incumbent upon the appellant to act in accordance with the terms of that proviso. Since the appellant did not do so, it was not open to him to challenge the validity of the bankruptcy notice.

Held, allowing the appeal:

(1) The appellant's complaint was not merely that the respondent in its bankruptcy notice mistakenly claimed more than what was actually due. The complaint was that the bankruptcy notice was not in accordance with the judgment. It was a separate and distinct head of challenge under s 3(1)(i) of the Act. The authority expressly authorized such a challenge. It is a jurisdictional challenge. That is because it is a condition precedent to the exercise of bankruptcy jurisdiction that a bankruptcy notice shall require the debtor to pay the judgment debt in accordance with the terms of the judgment on which it is founded. It follows that the present case was not a case of a mistake at all. It therefore fell well outside the scope of proviso (ii) to s 3(2) of the Act (see p 189A–C).

(2) The appellant had acted in accordance with the procedure prescribed by r 18 of the Rules in taking out a summons to set aside the bankruptcy notice. His complaint that the bankruptcy notice was not in accordance with the judgment on which it was based, was sufficiently made out. The notice was a nullity as at the date of its issue (see p 189C–D).

[Bahasa Malaysia summary

Isu di dalam rayuan ini adalah berkenaan dengan kesahan suatu notis kebankrapan yang dikeluarkan di atas permintaan responden. Notis kebankrapan menyatakan, antara lain, bahawa terdapat jumlah RM3,013,221.07 yang kena dibayar oleh perayu pada 31 Oktober 1989. Ia kemudiannya membentangkan butir-butir tuntutan responden kepada jumlah ini yang termasuk jumlah prinsipal yang kena dibayar di atas penghakiman yang diperolehi terhadap perayu dan beberapa jumlah faedah penalti yang dikira pada kadar berbeza. Juga terdapat tuntutan sebanyak RM80 untuk duti setem. Penghakiman yang diperoleh oleh responden, namun, tidak menyatakan apa-apa pun faedah penalti atau duti setem. Perayu telah mengeluarkan saman untuk mengetepikan notis kebankrapan di bawah k 18 Kaedah-Kaedah Kebankrapan 1969 ('kaedah tersebut'). Ia juga dihujahkan bahawa notis kebankrapan bukanlah menurut penghakiman tersebut dan dengan itu adalah batal dan tak sah ab initio. Responden menghujahkan bahawa ini hanyalah keadaan di mana suatu jumlah yang lebih besar telah dinyatakan di dalam notis. Ia adalah dihujahkan bahawa kes perayu adalah diliputi proviso (ii) kepada s 3(2) Akta Kebankrapan 1967 ('Akta tersebut'). Dengan itu, adalah kewajipan perayu tersebut untuk bertindak menurut terma-terma proviso tersebut. Oleh kerana perayu tidak berbuat demikian, ia adalah tidak terbuka baginya untuk mencabar kesahan notis kebankrapan.

Diputuskan, membenarkan rayuan tersebut:

(1) Aduan repsonden bukanlah hanya responden di dalam notis kebankrapan telah silap menuntut lebih daripada apa yang sebenarnya kena dibayar. Aduan tersebut adalah bahawa notis kebankrapan adalah bukan menurut penghakiman tersebut. Ia adalah cabaran yang berbeza dan berasingan di bawah s 3(1)(i) Akta tersebut. Autoriti tersebut secara nyata memberi kuasa untuk cabaran sedemikian. Ia adalah cabaran bidang kuasa. Ini adalah kerana ia adalah prasyarat kepada pelaksanaan bidang kuasa kebankrapan bahawa notis kebankrapan memerlukan penghutang untuk membayar hutang penghakiman menurut terma-terma penghakiman di mana ia didasarkan. Ia berikutan bahawa kes ini bukanlah kes kesilapan langsung. Ia adalah terjatuh di luar skop proviso (ii) kepada s 3(2) Akta tersebut (lihat ms 189A–C).

(2) Perayu telah bertindak menurut prosedur yang diperuntukkan oleh k 18 kaedah tersebut di dalam mengeluarkan saman untuk mengetepikan notis kebankrapan. Aduannya adalah bahawa notis kebankrapan bukanlah menurut penghakiman di mana ia didasarkan, telah dibuktikan dengan cukup. Notis tersebut adalah batal pada tarikh ia dikeluarkan (lihat ms 189C–D).]

Notes

For cases on bankruptcy notice generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1699–1816.

Cases referred to

A Debtor, Re [1908] 2 KB 684 (refd)
Arunachalam, Re; ex p Indian Overseas Bank Ltd [1968] 1 MLJ 89 (refd)
Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)
Development & Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724 (refd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 (refd)
OCBC Bank Bhd v Sethu [1998] 3 MLJ 76 (refd)
United Marine Supply Co, Re [1960] MLJ 305 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 3(2) proviso (ii) to s 3(2)
Bankruptcy Ordinance 1959 s 3(2)
Bankruptcy Rules 1969 rr 18, 95, 117
Rules of the High Court 1980 O 14

Mahinder Singh Dulku (*T Gunaseelan* and *Sahridah Aris* with him) (*Jayaraman, Ong & Co*) for the appellant.
Mansheel Kaur (*Celine Jeevamalar* with her) (*Rashid & Lee*) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court): We will first set out the circumstances in which this appeal came to be heard.

On 7 April 2000, the appellant moved this court on an urgent basis for a stay of bankruptcy proceedings against him pending the disposal of the appellant's appeal against the order of the High Court dismissing his summons to set aside the bankruptcy notice issued against him. The respondent's petition to have the appellant declared a bankrupt was fixed for hearing on 13 April 2000. At our suggestion, counsel agreed to treat the motion for a stay as the appeal proper.

We then granted the respondent leave to put in an additional affidavit exhibiting certain documents that had been omitted from the motion paper.

The appellant was directed to formally lodge his memorandum of appeal. We also dispensed with the filing of the formal record of appeal and instead directed that the motion and the affidavits do stand as the record. The learned President of the Court of Appeal then fixed the appeal for hearing before us on 14 April 2000.

There is only one issue in this appeal. It concerns the validity of a bankruptcy notice issued at the instance of the respondent. The matter arose in this way.

As long ago as 8 September 1988, the respondent obtained judgment against the appellant on a summons under O 14 of the Rules of the High Court 1980 ('the RHC'). The judgment awarded the respondent the sum of RM2,104,078.26, together with interest at the rate of 4% above the cost of funds with monthly rests from 15 April 1986 until the date of realization. That judgment was entered pursuant to an order of the registrar refusing the appellant leave to defend the action brought by the respondent against the appellant. The appellant's appeal against the registrar's decision to the judge in chambers is still pending disposal.

There being no stay of execution of the judgment, the respondent, on 31 October 1989, took out a bankruptcy notice against the appellant. Upon service of the bankruptcy notice upon him, the appellant, within the time limited by s 3(1)(i) of the Bankruptcy Act 1967 ('the Act'), filed an affidavit to set aside that notice. The appellant's said application under r 95 of the Bankruptcy Rules 1969 ('the Rules') is at present pending hearing before the High Court.

Then, on 2 October 1997, the appellant took out a summons to set aside the bankruptcy notice. He made this second application under r 18 of the Rules. His summons was supported by an affidavit. The respondent did not deliver an affidavit in reply. The appellant's application was heard and dismissed by the registrar. The appellant appealed to the judge in chambers against that dismissal. The learned judge, after hearing arguments, dismissed the appeal. It is against this order that the present appeal has been brought.

The bankruptcy notice in the present instance states, inter alia, that there is a sum of RM3,013,221.07 due from the appellant as at 31 October 1989. It then sets out particulars of the respondent's claim to this sum. These particulars include the principal sum due on the judgment dated 8 September 1988 and several sums of *penalty interest* calculated at varying rates. There is also a claim of RM80 as stamp duty. The judgment obtained by the respondent, however, makes no mention whatsoever of penalty interest or of stamp duty. As observed earlier, it merely awards the respondent 'the sum of RM2,104,078.26, together interest at the rate of 4% above the cost of funds with monthly rests from 15 April 1986 until the date of realisation'. The bankruptcy notice, on the other hand, makes no mention of the cost of funds.

Upon these facts, the appellant's case in the court below and before us rests upon the argument that the bankruptcy notice in question is not in

accordance with the judgment. It was submitted that the said notice was therefore null and void ab initio.

In order to appreciate this argument it is necessary to hearken to the relevant provisions of the Act and the Rules. They are ss 3(1)(i), 3(2) and the second proviso to s 3(2) of the Act, as well as rr 18 and 95 of the Rules. We will set them out.

First, the provisions of the Act:

> 3 (1) A debtor commits an Act of bankruptcy in each of the following cases:
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained.
>
> (2) A bankruptcy notice under this Act shall be in the prescribed form and shall state the consequences of non-compliance therewith and shall be served in the prescribed manner:
>
> Provided that a bankruptcy notice —
>
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Next, the Rules:

> 18 (1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.
>
> (2) Notwithstanding subrule (1), where applicable, all applications filed by way of motion before the commencement of these Rules may be heard by the Registrar as if they were applications made under such Rules.

95 (1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

These provisions have been considered by our courts in several cases that were read to us by counsel on both sides during argument. We must discuss them here.

In *Re United Marine Supply Co* [1960] MLJ 305, a judgment creditor presented a bankruptcy petition founded on a bankruptcy notice that included a sum of $50 which had been paid by the judgment debtor in part settlement of a judgment. Rose CJ, relying on the case of *Re A Debtor* [1908] 2 KB 684, held that the defect in the bankruptcy notice was not curable. He therefore dismissed the petition.

In *Re Arunachalam; ex p Indian Overseas Bank Ltd* [1968] 1 MLJ 89, judgment was entered against the debtor for a sum of $4,344.64 together with interest and costs. The debtor paid $300 in part payment of the judgment sum. The judgment creditor, nevertheless, took out a bankruptcy notice in which it claimed the full judgment sum. Within the seven days specified in the bankruptcy notice, the judgment debtor wrote a letter to the solicitor for the judgment creditor and to the senior assistant registrar of the High Court disputing the amount stated in the notice. He also disputed the validity of the notice. Chang Min Tat J (as he then was), held the bankruptcy notice invalid and set it aside. In the course of his judgment, his Lordship referred to s 3(2) of the Bankruptcy Ordinance 1959 and to the second proviso to that subsection which were the precursors of the equivalent provisions in the Act. His Lordship then said at p 90:

> The proviso was introduced in England by s 16 of the 1913 Act so that where such notice as is referred to is given, the position in law is the same as in England before 1913, and as in Singapore which has not a similar proviso. Conversely, where no such notice is given, then any English decision prior to 1913 is not applicable. The law would then be as in Singapore and as in England after 1913.
>
> *On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid, merely by reason of the excess.*
>
> Where the amount claimed in the bankruptcy notice is in excess and notice, as is referred to in the proviso to s 3(2) of the Ordinance, is given within seven days after the service of the bankruptcy notice, then the excess becomes relevant and on the authorities the bankruptcy notice is invalid, since it referred to a sum in respect of which the judgment-creditor could not have issued execution: *Re Child; ex p Child* [1892] 2 QB 77.

A In this case, I have to decide whether the letter dated 31 July 1967, was such a notice as is required to be given to dispute the validity of the bankruptcy notice. Not unnaturally, two opposing submissions were urged upon me, but while a considerable number of authorities was referred to on the law on the matter, no single reference was made to any decision on what are, if any, the requirements of such a notice.

B It is true that the letter could have been more happily or more accurately worded. But, read as a whole, what it says is that the judgment-debtor denies owing the judgment-creditor the sum claimed in the notice. The absence of the words 'or at all' seems to be significant. By reason of such absence, the judgment-debtor does not, in my view, deny the existence of any debt to the judgment-creditor. What he does deny is the debt of $4,344.64 cents as C claimed in the notice, but it seems to me he does not and cannot be taken to deny the existence of a debt for a smaller amount. If any doubt exists on this point, his next sentence that he disputes the validity of the bankruptcy notice would make it clear that he does not say he could not be adjudicated a bankrupt on a proper notice on the facts as existing then between the parties, but what he says is that he could not and should not be made the subject of any receiving or adjudicating orders on that particular notice. In my view, the D said letter is a notice to the judgment-creditor that the debtor disputes the validity of the bankruptcy notice on the ground of a mistake in the sum claimed as actually due.

I accordingly hold that the said letter dated 31 July 1967 was a sufficient notice to comply with the proviso to s 3(2) of the Bankruptcy Ordinance, and E that it was served within time. The bankruptcy notice is, therefore, bad and is set aside. There will be an order for costs to be paid by the judgment-creditor.' (Emphasis added.)

The next authority is *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263. It is a case of the first importance. In that case, the creditor, having obtained F judgment, served a bankruptcy notice on the debtor. The notice substantially complied with the statutory form (Form 5) prescribed by the Rules. The debtor failed to comply with the terms of the notice. The creditor then petitioned the court for a receiving and adjudication order. The debtor resisted the petition upon several grounds, all of which were rejected by the High Court. The debtor then appealed to the Supreme G Court. He re-agitated the same grounds he had advanced in the court below. The Supreme Court found no merit in all his contentions save one. The ground upon which the Supreme Court found for the debtor was that the notice was not in accordance with the judgment upon which it was founded. The judgment of the Supreme Court, which on that occasion was delivered by Mohamed Azmi SCJ, contains certain passages of cardinal H importance that merit recall.

The first passage in the judgment of his Lordship is at p 265 of the report where, after setting out s 3(1)(i) of the Act, he said:

> It is also essential that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution — see I *Re Woodall, ex parte Woodall* (1884) 13 QBD 479. If part of the debt has been paid or unenforceable in bankruptcy, the notice can only be issued for the balance — see *Re a Debtor (No 21 of 1937)* [1938] 2 All ER 824. Thus, a

bankruptcy notice can only be issued for the judgment debt or that part of the debt on which the creditor can issue execution. In the present case, as at the date of issue of the bankruptcy notice, only in respect of that part of the judgment debt of $2,325,000 the creditor could have issued execution. The remaining parts of the judgment debt on the interest on the loan and the costs of proceedings had not been quantified in accordance with the terms of the judgment, and hence these parts of the judgment debt were then incapable of being the subject of execution. In our view, the demand for payment of interest and costs was wrongly included in the bankruptcy notice because it was only after the issue of the notice ie when the creditor's petition was issued on 6 January 1986 that the creditor was able to ascertain the base lending rate of '10.25%' per annum, and also to quantify the costs at $9,880.50 after taxation. Clearly, the bankruptcy notice was bad in law as it contained demand for payment of the whole judgment debt within seven days when parts of the whole debt had not been or could not be quantified, and as such were incapable of being made the subject of execution, and consequently incapable of being complied with. Non-compliance with the demand to pay such unascertained sums cannot constitute an act of bankruptcy. The demand for payment in the notice must not only be quantified but must also be the correct sum owing as at the date of the notice.

The second passage, which is of critical importance, is at p 266 of the report. It reads as follows:

The Bankruptcy Act provides expressly that the notice must be to pay the judgment debt 'in accordance with the terms of the judgment'. Thus *Re HB* [1904] 1 KB 94 a bankruptcy notice was held to be bad if founded not according to its terms but on some agreement which modified the terms of the judgment, and therefore not in accordance with the terms of the judgment. Consequently, we are of the view that *when you have the judgment in the usual form that we have here, a bankruptcy notice under the Act must require payment of quantified sum or sums alleged to be due according to the terms of the judgment as at the date of issue of bankruptcy notice.* The duty is on the creditor to state the correct amount due, and there is no obligation imposed on the debtor to make inquiries if the amount demanded is ambiguous or unascertained. By demanding payment for unspecified sums in the bankruptcy notice, we hold that such demand is not in accordance with the terms of the judgment, and *applying the rule of strict construction*, the notice cannot be deemed to fall within s 3(1)(i) of the Bankruptcy Act. The amount must be quantified because the debtor is entitled to know from the bankruptcy notice exactly what is being claimed to be due on the whole judgment debt and payable by him within the seven-day period. *Non-compliance with the terms of the judgment renders the bankruptcy notice invalid, and that failure to comply with such notice is not an act of bankruptcy, and a bankruptcy petition founded on it must necessarily fail.* (Emphasis added.)

Low Mun has been followed in a number of later cases, including the decision of this court in *OCBC Bank Bhd v Sethu* [1998] 3 MLJ 769.

The next authority is *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298. It is also a decision of the Supreme Court. The facts were as follows.

On 27 April 1989, the judgment creditor issued a bankruptcy notice against the appellant requiring him to pay the sum of RM2,603,913.28

being the amount due on a final judgment including interest, professional charges and costs. The notice was served on the debtor on 2 May 1989. On 6 May 1989, he filed an affidavit purporting to be an affidavit to set aside the bankruptcy notice under r 95 of the Rules. On 20 October 1989, the creditor filed a petition against the debtor for a receiving and an adjudication order. The debtor then delivered another affidavit which contained several grounds, including the two grounds which he had deposed in his earlier affidavit. The learned judicial commissioner who heard the petition declared the debtor a bankrupt and made a receiving and an adjudication order. The debtor appealed. The Supreme Court dismissed his appeal.

Mohamed Dzaiddin SCJ who delivered the judgment of the court, after setting out r 95 of the Rules said (at pp 302–303):

> It seems clear to us that by r 95(1), the filing of the affidavit as in encl 3 operates as an application to set aside the bankruptcy notice, and the registrar is required to fix a day for the hearing of the application, and by sub-r (2), if the application cannot be heard before the time specified in the bankruptcy notice for compliance with its requirement, the registrar shall extend the time.
>
> In *Re A Debtor, ex p Debtor* [1935] 1 Ch 347, Lord Hanworth MR, delivering the judgment of the court, dealt with r 141 of the Bankruptcy Rules 915 (which is in pari materia with our r 95) and stated at p 349:
>
> > 'The filing of an affidavit for the purpose of an application to set aside a bankruptcy notice, if the affidavit is one which complies with r 140 of the Bankruptcy Rules 1915, is to be treated as notice of an application to set aside the notice, and then the procedure under r 141 follows. That rule is mandatory and clear. It says this: 'The filing of such affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for the hearing of the application, and not less than three days before the day so fixed shall give notice thereof, both to the debtor and the creditor, and their respective solicitors, if known. If the application cannot be heard until after the expiration of the time specified in the notice as the day on which the act of bankruptcy will be complete, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.'
>
> It is noted here that r 140 dealt with the affidavit which must contain 'a counterclaim, set-off or cross demand' and one which the deponent could not have set up in the action in which the judgment or order was obtained. Slesser LJ, in his judgment (at p 352) emphasised:
>
> > 'It is, therefore, necessary that the affidavit in question should, on the face of it, show a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which the debtor could not have set up in the action in which the judgment or order was obtained.'
>
> We are concerned here with the contents of the said affidavit. It merely denies and disputes that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but fails to disclose that he has a counterclaim, set-off or cross demand, etc against the respondent, which he is required to depose

under s 3(1)(i) of the Bankruptcy Act ('the Act') and provided for in Form 7. Following the above decision and in the face of the above affidavit, we are of the opinion that the said affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s 3(1)(i) of the Act, and the case should have been treated as if no affidavit under r 95 had in fact been filed. Similarly, as para 3 of the enclosure merely disputes his indebtedness in the said sum to the respondent 'based on an erroneous calculation and grossly exaggerated' without condescending to particulars of the amount actually due, we say that the said affidavit does not attract proviso 2(ii) of s 3 which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the actual amount due.

His Lordship then dealt with the debtor's second affidavit filed in opposition to the creditor's petition and said (at pp 304–305):

Bearing in mind that this 'affidavit in opposition' was filed one month after the creditor's petition was served on him and contained multitude of grounds other than the existence of a counter-claim or set-off or cross demand, he should have made a formal application by motion supported by this affidavit in compliance with r 18, which reads:

'Applications to be made by motion

Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.'

In our opinion, failure on the part of the appellant to follow r 18 renders his 'affidavit in opposition' ineffective and bad in law because unless the court otherwise directs, *challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit.* Unfortunately, he has failed to do so in this case. (Emphasis added.)

There is one comment we would make upon the foregoing passage. Rule 18 of the Rules as it then stood required applications to be made by motion. This was because matters in bankruptcy were in the first instance heard by the judge in open court. That is no longer the case. Now it is the registrar who hears them in chambers. That is why r 18 in its present form as earlier quoted requires applications in bankruptcy to be made by summons.

Finally, there is the decision of the Federal Court in *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724. It was a case where the debtor, at the hearing of the creditor's petition, challenged the bankruptcy notice on the ground that it was not in accordance with the judgment that the creditor had obtained against the debtor. The challenge was taken by means of an affidavit filed in opposition to the petition. The debtor succeeded at first instance. On appeal, the Court held for the creditor on the ground that the method of challenge adopted by the debtor was procedurally defective. Mohamed Dzaiddin FCJ, when delivering the judgment of the court allowing the creditor's appeal dealt with the point in this way (at p 731):

A Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The contents of the notice can be found in Form 16 of the Rules wherein it must be stated that he intends to oppose the making of the receiving order as prayed and that he intends either to dispute the petitioning creditor's debt or the act of bankruptcy or as the case may be. Rule 18 of the Rules further provides that except where the Rules or the Act provide, every application shall, unless the court otherwise directs, be made by motion supported by an affidavit. In *Datuk Lim Kheng Kim*, the Supreme Court held that failure to follow r 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross-demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. This court has no reason to disagree with the decision and will follow it. Accordingly, in our view, the respondent's affidavit in opposition cannot be substituted as a notice to show cause against the creditor's petition to challenge the validity of the bankruptcy notice.

His Lordship then proceeded to deal with the complaint that the bankruptcy notice was not in accordance with the judgment on which it was founded. He said (at p 732):

There is yet another ground that we ought to decide on. The judgment of the learned judge was that not only the sum specified in the bankruptcy notice had exceeded the amount actually due, it also was not in accordance with the terms of the consent judgment, reliance having been placed on the case of *Datuk Mohd Sari* [1992] 2 MLJ 344. In the event, the learned judge held, following *Datuk Mohd Sari*, that the amount specified in the bankruptcy notice was not in accordance with the terms of the consent judgment set out above. Consequently, the bankruptcy notice was invalid and non-compliance with it did not constitute an act of bankruptcy.

With respect, we are unable to agree with him. The case of *Datuk Mohd Sari*, while distinguishable from the facts of the instant appeal, ought to be regarded as an exception to s 3(2) proviso (ii) of the Act, because what was decided [1992] 2 MLJ 344 at p 348, based on its own special facts, was that:

> '... the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by s 3(1)(i) of the Bankruptcy Act 1967 but was in accordance with the terms of an agreement subsequently entered into by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967.'

To apply the ratio in *Datuk Mohd Sari* in the way the learned judge did, to every case where nothing else except when the sum specified in the bankruptcy notice is larger than the sum in accordance with a judgment on which the bankruptcy notice is based, would be undoubtedly to render nugatory s 3(2) proviso (ii) of the Act. Moreover, what is patently clear to us is that on the facts, the respondent cannot be allowed to dispute the validity of the bankruptcy notice on the ground on which he now relies because the notice of dispute by way of his affidavit affirmed on 18 February 1992 has not complied

with proviso (ii) to s 3(2) of the Act, it having been served on the appellant about seven months after the service of the bankruptcy notice on him (the respondent). The bankruptcy notice cannot therefore be challenged as to the interest specified therein.

In our judgment, the following propositions may be distilled from a rationalization of the authorities we have thus far discussed.

(1) When determining an issue under the Act, it is incumbent upon the court to accord its provisions a strict construction.

(2) The consequence of such an approach to construction is that a bankruptcy notice that requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment founded is null and void ab initio. Hence, a debtor does not commit an act of bankruptcy if he makes default upon such a notice.

(3) A challenge on the ground that a bankruptcy notice requires a debtor to pay a judgment debt otherwise than in accordance with the terms of the judgment may be taken at any time after service of the notice.

(4) A debtor who seeks to set aside a bankruptcy notice on the ground that it requires him to pay a judgment debt otherwise than in accordance with the terms of the judgment, must make an application in that behalf in accordance with r 18 of the Rules.

(5) A debtor who seeks to challenge the validity of a bankruptcy notice is also entitled to proceed under r 95 of the Rules. However, if does so, he must show that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt which he could not set up in the action in which the judgment was obtained. Further, he must act within the time limit prescribed by s 3(1)(i) of the Act.

(6) A debtor who seeks to challenge a bankruptcy notice on the ground that the amount specified therein exceeds the amount actually due, must act in accordance with proviso (ii) to s 3(2) of the Act. Hence, he must, within the time prescribed in the bankruptcy notice give notice in writing to the creditor that he disputes the validity of the notice on the ground that it mistakenly claims an amount larger than that lawfully due.

(7) A debtor who opposes a creditor's petition must comply with the procedure prescribed by r 117 of the Rules. If he does not do so, any challenge he may mount is liable to fail for non-compliance of the Rules.

Returning to the case at hand, Ms Mansheel Kaur of counsel for the respondent has submitted that this is merely an instance where a larger sum has been specified in the notice. She argues that the appellant's case comes within proviso (ii) to s 3(2). It was therefore incumbent for the appellant to act in accordance with the terms of that proviso. Since the appellant did not do so, it is not now open to him to challenge the validity

of the bankruptcy notice. With respect, we do not agree with these arguments.

The appellant's complaint is not merely that the respondent in its bankruptcy notice mistakenly claimed more than what is actually due, e.g., because there was part payment which the notice did not give credit as in *Re Arunachalam*. The complaint here is that the bankruptcy notice is not in accordance with the judgment. It is a separate and distinct head of challenge under s 3(1)(i). The decision in *Low Mun* expressly authorises such a challenge. It is a jurisdictional challenge. That is because it is a condition precedent to the exercise of bankruptcy jurisdiction that a bankruptcy notice shall require the debtor to pay the judgment debt in accordance with the terms of the judgment on which it is founded. It follows that what we have here is not a case of a mistake at all. It therefore falls well outside the scope of proviso (ii) to s 3(2).

Applying the principles that are to be culled from the authorities to the facts of the present appeal, we are of opinion that the appellant has acted in accordance with the procedure prescribed by r 18 in taking out a summons to set aside the bankruptcy notice. His complaint that the bankruptcy notice is not in accordance with the judgment on which it is based is, we think, sufficiently made out. As stated earlier, the notice here makes a claim, inter alia, for penalty interest which is an item not awarded by the judgment. In accordance with the *Low Mun* principle, the notice was a nullity as at the date of its issue.

There is one other argument that we must deal with. Mr Mahinder Singh submitted that the decision in *Datuk Ong Kian Seng* is irreconcilable with that in *Low Mun*. We do not agree. It is true that *Low Mun* was not referred to in the judgment of the Court in *Datuk Ong Kian Seng*. However, upon closer examination it will be found that each of these cases deals with different propositions. *Low Mun* has to do with the jurisdictional postulate in bankruptcy while *Datuk Ong Kian Seng* has to do with the procedural aspects of bankruptcy jurisdiction. In other words, a debtor may invoke the *Low Mun* principle at any time. But, if he chooses to do so, he must follow the appropriate procedure made available by the Rules at the different stages of bankruptcy jurisdiction. Thus, if the *Low Mun* challenge is to be taken before the presentation of the petition, he must make an application in accordance with r 18. If, however, he wishes to oppose the petition at the hearing, he must act in accordance with r 117.

Further, it depends on the facts of each case whether the challenge taken is jurisdictional as in *Low Mun*, or whether it is merely a case that falls under the second proviso to s 3(2) of the Act. We believe that there is sufficient guidance in cases of high authority to enable a court make the distinction. And judges by their training should be able to differentiate between the two types of challenges.

For the reasons already given, we would allow the appeal. The orders made in the court below are set aside. There shall be an order in terms of the appellant's summons. The bankruptcy notice is set aside. The respondent must pay the costs of this appeal and all costs incurred in the

court below. The deposit in court shall be refunded to the appellant. The respondent is, of course, at liberty to issue a fresh bankruptcy notice.

Appeal allowed.

Reported by Jafisah Jaafar